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# In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 88

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

vs.

FRUIT & VEGETABLE PACKERS & WAREHOUSEMEN, LOCAL 760, and JOINT COUNCIL No. 28 of the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Respondents*.

## BRIEF OF TREE FRUITS LABOR RELATIONS COMMITTEE, INC., *Amicus Curiae*.

ALFRED J. SCHWEPPE
MARY ELLEN KRUG
*Attorneys for Amicus Curiae.*

SCHWEPPE, REITER, DOOLITTLE & KRUG
657 Colman Building
Seattle, Washington 98104

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No. 68

## BRIEF OF TREE FRUITS LABOR RELATIONS COMMITTEE, INC., *Amicus Curiae*.

### OPINIONS BELOW

The opinion of the Court of Appeals (R. 56-66) is reported at 308 F.2d 311. The findings of fact, conclusions of law and order of the Board (R. 34-44) are reported at 132 NLRB 1172.

### QUESTION PRESENTED

Section 8(b)(4)(ii)(B) of the National Labor Relations Act, as amended, makes it an unfair labor practice for a labor organization "to threaten, coerce, or restrain any person," where an object is to force him to cease doing business with another person, provided that "nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing. A proviso modifying all of subsection

(4) excepts in certain situations "publicity, other than picketing * * * as long as such publicity does not have an effect on deliveries.

The question presented is whether picketing at a retail store, urging customers of the store not to purchase products which the store has obtained from an employer with whom the union has a primary dispute, constitutes a "threat, coercion or restraint" within the meaning of this section, absent a showing that the picketing in fact inflicted any economic injury upon the store.

## STATUTE INVOLVED

The statute involved is the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 151, *et seq.*) the pertinent provisions of which are set forth in Appendix A of this brief.

## INTEREST OF AMICUS CURIAE

The *Amicus Curiae* is the charging party in the proceeding before the National Labor Relations Board which is the subject of the instant case, and is the employer and primary party directly affected by the secondary boycott under review here.

Tree Fruits files this brief as *amicus curiae* with the written consent of all parties to the case.

Tree Fruits Labor Relations Committee, Inc., hereinafter called Tree Fruits, is a Washington corporation with its principal office in Yakima, Washington. It is organized to advise with and act on behalf of its twenty-one employer-members which are business firms in the fruit-packing and warehousing industry in the vicinity of Yakima. It acts as the agent of its employer-members in labor disputes and in bargaining collectively with labor organizations represent-

ing employees of its employer-members (R. 17, 19, 23). Both Tree Fruits and its employer-members are employers within the meaning of section 2(2) of the National Labor Relations Act (R. 18).

## SUMMARY OF ARGUMENT

The decision of the Court of Appeals of the District is in conflict with the later decision of *Burr v. NLRB*, .... F.(2d) ....., 47 Labor Cases ¶ 18,376, decided July 18, 1963, by the Fifth Circuit, which we submit correctly reflects the intent of Congress.

The Court of Appeals of the District misconstrued section 8(b)(4) of the Act in such a way as to embarrass the enforcement of the entire paragraph, not only clause (B). By holding that the effect of picketing for a proscribed purpose must be proved before the Board can order the picketer to cease and desist from such conduct, the court has departed from the interpretation of section 8(b)(4) which has been settled since the section was first enacted in 1947. The Court of Appeals ignored the proviso to clause (B) of section 8(b)(4) and misconstrued the proviso which modifies all of paragraph (4). There is no basis in the language of the statute, its legislative history or the cases decided under the section as it stood prior to amendment, for holding that the *effect* of the picketing or other conduct is an element of an unfair labor practice under section 8(b)(4).

By attaching significance to the identity of the party filing the charge, the Court of Appeals has nullified to a large extent the provisions of section 10(b) and the Board's regulations providing that an unfair labor practice charge may be filed by *anyone*, not just by the real party in interest, or party directly injured. This error affects the enforcement of the entire Act.

The conclusion of the Court of Appeals that interpreting section 8(b)(4) as the legislative history indicates Congress intended and as the Board has interpreted it, creates difficulties under the First Amendment is unwarranted in the light of *Giboney v. Empire Ice & Storage Co.*, 336 U.S. 490, 69 S.Ct. 684, 93 L.Ed. 834, and *Building Service Employees Union v. Gazzam*, 339 U.S. 532, 70 S.Ct. 784, 94 L.Ed. 1045, rehearing denied, 339 U.S. 991, 70 S.Ct. 1019, 94 L.Ed. 1391.

Congress clearly intended to ban all secondary picketing and especially picketing of secondary employers with appeals addressed to the consuming public not to buy merchandise produced or distributed by an employer with whom the union has a primary dispute.

Such legislation is well within the power of Congress to confine the scope of industrial disputes in the interest of keeping the channels of interstate commerce open and unimpaired. The Congressional intent should be given effect.

## ARGUMENT

### Preface

This case and its companion case, *N.L.R.B. v. Servette, Inc.*, No. 1053, bring before this court for the first time the 1959 amendments to the Labor-Management Relations Act of 1947 (Title 29 U.S.C. § 151, *et seq.*), relating to secondary boycotts, section 8(b)(4)(B) (Title 29 U.S.C. § 158(b)(4)(B)), and, in particular, those amendments as they relate to appeals by unions directed to the customers of secondary employers not to buy the products produced by a primary employer which the secondary employer is offering for sale, in other words, to what are commonly known as "consumer boycotts."

In the instant case the appeals were made by ambulatory pickets wearing cardboard placards which stated:

"TO THE CONSUMER: NON-UNION WASHINGTON STATE APPLES ARE BEING SOLD AT THIS STORE. PLEASE DO NOT PURCHASE SUCH APPLES. THANK YOU. TEAMSTERS LOCAL 760, YAKIMA, WASHINGTON."

The pickets also distributed handbills (R. 20).

Exhibit 9 is a photograph of two pickets patrolling in front of one of the secondary employer's stores and is reproduced in the record at page 33. Exhibits 7 and 8 are copies of the handbills which the pickets distributed (R. 31, 32).

In the instant case the United States Court of Appeals for the District of Columbia held that:

(1) ". . . § 8(b)(4)(ii) outlaws only such conduct (including picketing) as in fact threatens, coerces or restrains secondary employers, and that the proviso is intended to exempt from regulation 'publicity other than picketing' even though it threatens, coerces or restrains an employer;" (R. 61) and

(2) any other interpretation of the statutory language would raise problems under the First Amendment of the Constitution of the United States (R. 62).

The First Amendment is set out in its entirety in Appendix B to this brief.

In the instant case there was no evidence as to the effect of the picketing.

In *Burr v. N.L.R.B.*, ——F.(2d) ——, 47 Labor Cases ¶ 18,376, decided July 18, 1963, the United States Court of Appeals for the Fifth Circuit declined to follow the court below and reached a diametrically opposite result on an indistinguishable set of facts. In that case the Board held, as it did in the instant case, that the picketing violated 8(b)(4)(ii), but not (i); the Fifth Circuit held that the picketing violated both 8(b)(4)(i) and (ii). The charging

party in the instant case did not seek review of the Board's decision with reference to (i) so the instant case presents the question of violation of (ii) only.

In the *Servette* case the appeals were made by the distribution of handbills without picketing, for the purpose of persuading customers not to buy and retailers not to sell merchandise not *produced*, but *distributed*, by the primary employer.

In *N.L.R.B. v. Servette*, the United States Court of Appeals for the Ninth Circuit held that the so-called "publicity proviso" to Section 8(b)(4) did not protect handbilling in furtherance of a dispute with a distributor as opposed to a producer, since the distributor did not produce any products. The same court reached the same result in *Great Western Broadcasting Corporation v. N.L.R.B.*, 310 F.2d 591.

Thus the two cases in which the court has granted *certiorari* present questions of first impression involving the same section of the statute, but the result in neither case will be dispositive of the other.

## I.

## The Court Below Misconstrued the Statute

### A. Legislative History

The Court of Appeals for the District candidly admitted that (then) Senator Kennedy and other legislators thought section 8(b)(4)(ii) would ban secondary consumer picketing, pp. 314-315, R. 60-61. Indeed, the legislative history hardly leaves room for argument on this point.

The message of the President of the United States, delivered January 28, 1959, Transmitting a 20 Point Program to Eliminate Abuses and Improper Practices in Labor-Management Relations, cited the need for federal legisla-

tion "to protect the public and innocent third parties from unfair and coercive practices, such as boycotting and blackmail picketing." The President said:

> "I recommend legislation—
>
> * * * To amend the secondary boycott provisions of the National Labor Relations Act so as to cover the direct coercion of employers to cease or agree to cease doing business with other persons; union pressures directed against secondary employers not otherwise subject to the act * * *." (1 Legis. Hist. p. 81-82)

Senate Report No. 187 on Senate Bill 1555, the Kennedy-Ervin bill relating to regulation of union funds, promoting union democracy, clarifying the "no man's land," and curbing activities of middlemen, but containing no amendments to the unfair labor practice section of the Taft-Hartley Act, included minority views which ultimately prevailed in the Congress. These minority views included the following:

> "The records of the National Labor Relations Board show that from the enactment of Taft-Hartley in 1947 until the present, 34 per cent of the secondary boycott cases coming to the Board involve the Teamsters Union which represents about 10 per cent of all of the members of organized labor. Thus, the figures demonstrate, that like minority picketing, the secondary boycott is a favorite device of the Teamsters, and is used by them at least three and one-half times as frequently as it is by any of the rest of the labor movement.
>
> "The basic justification for banning secondary boycotts is to protect genuinely neutral employers and their employees; not themselves involved in a labor dispute, against economic coercion designed to give a labor union victory in a dispute with some other employer. * * *
>
> "The major loopholes in the present ban on secondary boycotts are:

"(1) *Coercion of employers*—Present law makes it an unfair labor practice for a union or its agents to urge the employees of an employer to refuse to perform work for the purpose of compelling their employer to cease doing business with some other person. This provides the biggest loophole in present law. The prohibition is against the threatening or urging of the 'employees' of the other employer. Nothing is said about urging or persuading the employer of the secondary employees. Thus a union having a dispute with or attempting to organize the employees of employer A can go directly to employer B, who either uses employer A's products or supplies employer A with raw materials, and threaten employer B with a strike or picket line if he continues to do business with employer A. If the union happens to be the bargaining agent for the employees of B, it takes little persuasion of B to get him to stop doing business with A. B does not want trouble with the union with which he has a contract and anyway A is only one of his many suppliers or customers. So B readily succumbs to the union pressure and tells A he no longer wishes A's products or will no longer supply raw materials to A, and in so doing no one has violated present law. But look at the situation of employer A. Perhaps B is his primary customer or supplier. His alternative is to yield entirely to the union's demands, force his employees to join the union, or go out of business. Countless examples of actual cases corresponding to this hypothetical have been presented to congressional committees in various hearings since 1947.

"The bill, S. 748, meets this problem by amending section 8(b)(4) of the present law to make the restriction apply to 'threatern [sic], coerce, or restrain any person engaged in commerce * * *,' as well as 'induce or encourage any individual employed by any person.'" (1 Legis. Hist. 474-475)

Senator John L. McClellan, a proponent of the legislation, said:

> "* * * In other words, if there were a strike in a certain plant, and I, as a merchant, handled the products of that plant, under the amendment the union could not use picketing to try to compel me to cease handling the products of the plant where the labor dispute is under way.* * * " (II Legis. Hist. 1193(3))

Senator Wayne L. Morse, member of the Senate Committee on Labor and Public Welfare, an opponent of the legislation, said:

> "* * * This bill does not stop with threats and with illegalizing the hot cargo agreement. It also makes it illegal for a union to 'coerce, or restrain.' This prohibits consumer picketing. What is consumer picketing? A shoe manufacturer sells his product through a department store. The employees of the shoe manufacturer go on strike for higher wages. The employees, in addition to picketing the manufacturer, also picket at the premises of the department store with a sign saying 'Do not buy X shoes'. This is consumer picketing, an appeal to the public not to buy the product of a struck manufacturer.* * * " (II Legis. Hist. 1426(3))

Senator Barry M. Goldwater, member of the Senate Committee on Labor and Public Welfare, and a proponent of the legislation, said in two extensions of his remarks in the Congressional Record:

> "* * * But let me give you a variation that is not prohibited under the Taft-Hartley Act.
>
> "Take the same set of facts. The union has a dispute with Employer A. Employer A does business with Employer B. Instead of throwing a picket line around Employer B, the business agent of the union goes directly to Employer B himself in his office and says, 'Unless you stop doing business with Employer A, we will throw a picket line around your plant.' That's not il-

legal under present law, because there the inducement to cease doing business is made directly upon the secondary employer and not through his employees. Now that would be illegal under the new bill.

"Question: That was a loophole in the old law?

"Answer: Right." (II Legis. Hist. 1829(1))

"• • • This new amendment in the conference report also makes secondary consumer boycotts illegal subject to certain narrow and limited exceptions. Thus, under previous law a labor union having a dispute with the producer, company A, could lawfully picket the distributor, company B, who carried company A's products for sale, for the purpose of inducing consumers not to patronize company B, subject to certain restrictions imposed by the Board. Under the new amendment, such picketing becomes illegal, but the union is permitted to engage in publicity—by means other than picketing—truthfully advising the public that company B the distributor—the secondary employer—is distributing goods produced by Company A, the producer with whom such labor union has a primary dispute. • • • (II Legis. Hist. 1857(2))

Senator Paul Douglas, an opponent of the legislation, did not construe the effect of the language any differently, II Legis. Hist. 1833(1).

At no point in the debates was it even suggested that the *effect* of the picketing need be assessed before its *legality* could be determined.

On the contrary, opponents and proponents alike were of the opinion that the language of the amendment would require the Board to look to two factors only, objects and means. If (1) the object was to compel the secondary employer to cease doing business with the primary employer, and (2) the means used was picketing or other threats, coercion or restraint, save only publicity other than picketing,

under limited conditions, the conduct was unlawful, and the Board was not only to order the union to cease and desist from it, section 10 (c), but to ask the district court to enjoin it, section 10 (l). (Pertinent portions of section 10 are set forth in Appendix A of this brief.)

Thus Representative John A. LaFore, Jr., a member of the House Committee on Education and Labor, said:

> "* * * Another similar insidious variety is secondary consumer boycott. Under the present law a union can apparently picket the customer entrances of a retail store which is carrying a product manufactured by a company with which a union has a primary dispute. Similarly a union can organize a consumer or customer boycott against a distributing firm merely because that company advertises on a radio or television station or in a newspaper with which the union has a primary dispute. Sponsors of radio and TV programs and advertisers in newspapers are threatened with economic pressure and a loss of business by the union unless they discontinue their advertising. These are examples of secondary or consumer boycotts, a potent form of economic pressure that are intended to be made unlawful by the language of my bill." II Legis. Hist. 1471 (1) (2)

The legislative history is replete with references to the "loophole" in the 1947 Act which the Congress was determined to close.

The "loophole" was that the 1947 Act banned only inducement and encouragement directed to the employees of secondary employers. Congress intended to close the "loophole" by prohibiting inducement directed to *any individual employer by any person* engaged in commerce and by prohibiting threats, restraint or coercion of *any* person engaged in commerce, where an object is one of the four proscribed objects set out in subsections (A), (B), (C) and (D). Cox, the Landrum-Griffin Amendment to the National

Labor Relations Act, 44 Minn. L. Rev., 257. [It was stipulated that Safeway Stores, the secondary employer picketed, was engaged in commerce within the meaning of the Act (R. 18).]

Under the Act as it stood prior to the 1959 amendments, the actual effect of the picketing on the secondary employer was immaterial. *N.L.R.B. v. Business Machine and Office Appliance Mechanics*, 228 F.2d 558 (CA-2, 1955) cert. den., 351 U.S. 962, 76 S.Ct. 1025, 100 L.Ed. 1483 (1956); *N.L.R.B. v. Associated Musicians*, 226 F.2d 900 (CA-2, 1955) cert. den., 351 U.S. 962, 76 S.Ct. 1025, 100 L.Ed. 1483 (1956). "If the intended effect of the picketing be a prohibited one, the lack of success in coercing the neutral employees is immaterial." *N.L.R.B. v. Dallas General Drivers, Local No. 745*, 264 F.2d 642 at 648 (CA-5, 1959) cert. den. 361 U.S. 814, 80 S.Ct. 54, 4 L.Ed.2d 61 (1959).

Since Congress legislated extensively and elaborately on this subject in 1959 without inserting any new language to indicate that the Board or the courts should look to the *effect* of conduct instead of only to conduct and intent, it is a reasonable inference, and a principle of statutory interpretation, that Congress approved and adopted the contemporaneous construction expressed by the Board and the courts in the above-cited cases, Sutherland, Statutory Construction, 3rd Ed., § 5109; *N.L.R.B. v. Gullett Gin Co.*, 340 U.S. 361, 365-366, 68 S.Ct. 611, 92 L.Ed. 798.

The United States Court of Appeals for the Fifth Circuit has correctly appraised the legislative history in its opinion *in Burr v. N.L.R.B.*, ——— F.2d ———, 47 Labor Cases ¶ 18,376, p. 29, 482.

**B. The Language of the Section Does Not Support the Interpretation of the Court Below.**

**1. The use of the word, "threaten," negates the necessity of proving the effect of the picketing.**

After conceding that the legislative history strongly tends to support the Board's interpretation, the court below said:

> "Looking solely to the language of the statute, however, we believe the most plausible reading to be that § 8(b)(4)(ii) outlaws only such conduct (including picketing) as in fact threatens, coerces or restrains secondary employers, and that the proviso is intended to exempt from regulation 'publicity other than picketing' even though it threatens, coerces or restrains an employer. For example, handbilling which has a severe economic impact on the secondary employer's business might be 'coercive,' but it would be exempted from regulation by the proviso. Perhaps the Board's view—that the proviso reflects the draftsman's assumption that without it all secondary publicity is banned because it necessarily threatens, coerces or restrains a secondary employer—can be squared with the statutory language. But that appears to be a less plausible reading of the statute." 308 F.2d 315, R. 61-62.

Such an interpretation would be more "plausible" if Congress had omitted the word "threaten," but to prohibit a threat does not mean that the threat is prohibited only if the threat is effective in obtaining the result sought by the threatener.

The threat is unlawful if it is made for an unlawful purpose, such as to force or require a person to cease selling the products of any other person or to force or require a person to cease doing business with another person.

Well-established precedents sustain the Board's view that two factors and two only need be considered in determining the legality of the conduct in question, namely, the conduct

itself, or the means employed, and the object. Thus a threat to picket for the proscribed objective would be unlawful, even though no picketing took place, and even though the threat was ineffective.

In *Brown v. American Federation of Television and Radio Artists*, 191 F.Supp. 676 (N.D. Cal. 1961), the court said:

> "In all events, even if respondents *were* entitled to publicize the facts by circulating such a leaflet, they were *not* entitled to threaten KXTV's advertisers, engaged in commerce, with such action, in order to force or require them to cease doing business with KXTV. It is *not* true that one may threaten to do whatever he may do. One may not threaten to take lawful action, where the purpose of the threat is illicit. Thus, a magazine editor may lawfully publish the truthful facts concerning unsavory incidents in the life of a person who is prominent in the public eye, such as a movie star or politician; but the magazine editor may not lawfully threaten to publish such facts unless the person concerned pays blackmail to the editor." (p. 679) (Emphasis by the Court)

Any other interpretation renders a prohibition against threatening a nullity. The Court of Appeals for the Fifth Circuit aptly pointed out:

> "The fallacy of the approach of the *Fruit & Vegetable* case is demonstrated by the fact that its standard effectually [effectively] deprives § (ii) of any real utility. The thesis of that decision is that the adverse economic effect of the consumer picket line must be demonstrated affirmatively as a fact. That means that to obtain the protection afforded by Congress against the *threat* of injury, a party must first be injured. And if it is actual injury, what is to be the test of injury? If, for example, under the union's threat of posting a consumer picket line, a secondary retailer knuckles under

as some did in *Servette, Inc.* (see note 10, *supra*), what must that retailer show? Must he prove not only that he lost the opportunity of making the average number of sales of that product, but also that this was not offset by substituted products of competitor suppliers? Must the retailer demonstrate by identified customers that some refused to (a) purchase the picketed product or (b) patronize him at all? These and many other questions which would inhere in every secondary consumer picketing demonstrate convincingly why Congress could not have intended that an Amendment designed to close a major and serious loophole would be stripped of all practical utility either by requiring that threatened damage be actually sustained, or that one feeling the pinch furnish specific answers to metaphysical inquiries as to the harm suffered." pp. 16-17 slip opinion, 47 Labor Cases ¶ 18, 376, pp. 29, 484.

The Notice to Store Manager and Store Employees, Exhibit 9 (R. 29-30) which the respondents gave to the managers of the Safeway Stores listed on Exhibit 4 (R. 26), said in part:

"Notice to Storage [*sic*] Manager and Store Employees.

"We are advised that you are presently engaged in selling Washington State Apples. . . .

"The strike at Yakima is still continuing and in order to win this strike, we must ask the consuming public not to purchase Washington State Apples.

"Therefore, we are going to place peaceful pickets at the entrances to your store for the purpose of trying to persuade the public not to buy Washington Apples. . . .

"As noted above, our information indicates that you are presently selling Washington State Apples. If, however, this information is not correct and you are selling apples exclusively from another state, please notify the undersigned and we will see that pickets are

transferred to another store where Washington State Apples are actually being sold."

No clearer notice could be given that the stores would be picketed until they stopped selling the offending product. This is precisely the sort of threat Congress sought to prohibit. The threat was complete when the notice was delivered and violated 8(b)(4)(ii)(B) even if no picketing had ensued. But picketing did ensue as indicated on Exhibit 4 (R. 26). Forty-six separate Safeway stores were in fact picketed for periods of time ranging from one to three days.

Had Congress intended that the *effect* of the conduct be appraised before its legality could be determined, it certainly would not have declared it an unfair labor practice to "threaten" as well as to restrain or coerce.

**2. The Court of Appeals Failed to Consider the Proviso to Clause (B).**

The Court of Appeals failed to take any cognizance at all of the proviso to clause (B) which reads:

> "Provided, that nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing."

So much attention has been focused on the last proviso to Section 8(b)(4), which specifically refers to consumers, that the proviso to clause (B), which specifically refers to picketing, has been largely passed over, but the proviso to clause (B) is dispositive of the question of whether or not peaceful picketing, without more, is comprised within the terms, "threaten, coerce or restrain," and disposes of that question in the affirmative. The proviso makes crystal clear that secondary strikes and secondary picketing, *secondary only*, fall within the ban of the statute.

The language of 8(b)(4)(ii)(B) without the proviso was originally embodied in S.B. 1384 introduced by Senator McClellan, I Legis History 327, 328. In the original Landrum-Griffin Bill, H.R. 8400, the same text appeared without the proviso, I Legis. Hist. 619, 681. The proviso was added by the House and Senate conferees. Mr. Griffin, as one of the House conferees, submitted a preliminary conference report including a table entitled, "Summary analysis of conference agreement as to Title VII—Taft-Hartley amendments." This table included the following:

| | House Bill (Landrum-Griffin) | Senate Bill (Kennedy-Ervin) | Agreement Conference |
|---|---|---|---|
| III. Other secondary boycotts | • • • | • • • | • • • |
| | 4. Prohibits secondary customer picketing at retail store which happens to sell product produced by manufacturer with whom union has dispute. | ——— do ——— | Adopt House provision with clarification that other forms of publicity are not prohibited; also clarification that picketing at primary site is not secondary boycott. II Legis. Hist. p. 1712. |

Mr. Frank Thompson, Jr., of New Jersey, a member of the conference committee, speaking in support of the conference report, said in part:

> "Employees will also be entitled to publicize, without picketing, the fact that a wholesaler or retailer sells goods of a company involved in a labor dispute." II Legis. Hist. p. 1720.

Similarly, Mr. Roland V. Libonati of Illinois, speaking against the conference report, said:

> "Unions can only advertise against an establishment selling unfair goods. Picket lines are illegal

where there is no primary dispute." II Legis. Hist. p. 1734.

Had "picketing" not been understood to be included in the terms "threaten, coerce or restrain," this proviso to clause (B) would have be meaningless. Picketing which is not peaceful is unlawful whether at a primary or secondary site. Picketing "not otherwise unlawful" is necessarily peaceful. The proviso draws peaceful *primary* picketing from the ban of the statute, leaving *secondary* picketing, however peaceful, banned.

**3. Effects are to be considered only for determining applicability of the proviso to subsection 8(b) (4).**

If there still remained any doubt about the meaning of 8(b)(4), that doubt should be laid to rest by the proviso which modifies all of paragraph (4), and which reads:

> "Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, *other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect* of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution." (Emphasis supplied)

This proviso reserves to the union or workers involved in the primary dispute, all forms of truthful publicity save one, picketing, for advising consumers, other members of organized labor and the public generally that a product or

products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have certain specified effects.

This proviso is the only place in paragraph (4) where Congress required proof of the effect of conduct before limiting the conduct. The only form of publicity denied any protection from the proviso is picketing.

The court below observed that when Congress wanted to outlaw picketing *per se*, it knew how to do so and cited 8(b)(7) as an example. Section 8(b)(7) is reproduced in Appendix A to this brief. Section 8(b)(7), however, *forbids nothing but picketing and threats to picket.*

Section 8(b)(4) is much broader, and prohibits in (i) inducement or encouragement, and in (ii), threats, coercion or restraint, for four proscribed objectives. That picketing was one of the forms of threat, coercion or restraint encompassed in the proscription is clear from the legislative history, the proviso to clause (B), and the proviso to paragraph (4). The proviso to (B) saved primary, but not secondary, picketing from the ban and the proviso to paragraph (4) saved publicity other than picketing for certain limited purposes, as long as specified effects were not engendered.

**4. The decision of the Court of Appeals affects the construction and enforcement of all of subsection 8 (b) (4).**

If the decision of the court below that the *effect* of the picketing must be determined before the picketing for the proscribed object falls within the ban of the statute were to be sustained, the decision would not merely render ineffectual the efforts of Congress to ban consumer picketing

as the Fifth Circuit observed, and all other secondary boycotts, but would embarrass the efficacy of all of 8(b)(4).

If it is necessary to show that the threats, coercion or restraint imposed on a secondary employer were effective to procure the proscribed objective, it must necessarily follow that the inducement or encouragement of employees referred to in (i) must also be effective in order to constitute an unfair labor practice.

The application to clauses (A), (C) and (D) of the court's holding that the effect of the picketing must be considered to find a violation of 8(b)(4) would be inevitable, if the decision were allowed to stand, and would lead to absurd results.

If peaceful picketing is not included within the words "threaten, coerce, or restrain," unless the picketing adversely affects the secondary employer's business, it must follow that 8(b)(4)(A) is not violated by picketing where an object thereof is forcing or requiring any employer or self-employed person to join any labor or employer organization, unless the self-employed person or employer actually joins the labor or employer organization or can prove economic injury from the picketing.

Likewise, picketing where an object thereof is (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees when another labor organization has been certified as the representative of such employees, would not be unlawful unless the employer yielded to the prohibited objective or suffered economic hardship as a result of the picketing.

Similarly, in the case of picketing (D) to force or require an employer to assign particular work to employees

in a particular labor organization, the Board would have to assess the effect of the picketing before it could order it stopped.

Thus the decision of the court of appeals affects not only the interpretation, application and administration of clause (B) of Section 8(b)(4)(ii), but all of 8(b)(4), because, what the court has held is, that conduct, unlawful intent and unlawful objective do not equal an unfair labor practice, but that the actual effect of the conduct must be assessed to determine whether or not the conduct constitutes a threat, coercion or restraint.

Section 8(b)(4) has never been so construed.

Such a reading of 8(b)(4) is inconsistent with the reading given by the Board and the courts, including the United States Court of Appeals for the District of Columbia, *Sheet Metal Workers v. NLRB* (CA-D.C., 1961) 293 F.2d 141; *NLRB v. United Construction Workers* (CA-4, 1952) 198 F.2d 391; *Printing Specialties & Paper Converters Union v. LeBaron* (CA-9, 1948) 171 F.2d 331; *NLRB v. Garment Workers Local 155* (CA-2, 1959) 267 F.2d 916. In the last-cited case the Court of Appeals for the Second Circuit said of 8(b)(4)(i) in part:

> "It has long been recognized that picketing in labor disputes often contains elements both of persuasion and of coercion. Insofar as picketing is free from coercive *intent or effect*, Congress has declared that it shall not be the basis for a finding of an unfair labor practice; and perhaps the declaration is necessary, if the Act is to avoid the First Amendment's imperative. 29 U.S.C.A. § 158 (c); see *International Brotherhood of Electrical Workers, Local 501, AFL v. N.L.R.B.*, 341 U.S. 694, 71 S.Ct. 954, 95 L.Ed. 1299. Nor is picketing unfair, under the Act, merely because it is shown to be coercive in effect; the tests set forth in the Act must be

> met. See *Garner v. Teamsters, etc.*, 346 U.S. 485, 74 S.Ct. 161, 98 L.Ed. 228. To render the union's activities illegal under § 8(b)(4)(C), two elements must concur: the labor organization must be inducing employees to strike or to engage in a concerted refusal to work; and an object of the union's activities must be its recognition by the employer as the representative of its employees, where another union has been certified by the Board." (267 F.2d 919) (Emphasis supplied)

In the above-cited cases evidence of the *effect* of picketing has been considered for the purpose of shedding light on the *intent* of the picketing, but the effect has never been considered an *element* of the unfair practice.

In the instant case the *intent* of the picketing is not in dispute.

**5. The Court of Appeals erroneously considered the identity of the charging party in assessing illegality.**

The court's observation that it is Tree Fruits, not Safeway, which is the charging party points to an academic and theoretical approach to the issue, rather than the practical approach sought by the Congress.

Section 10(b) of the Act does not require that the charge be filed by the real party in interest, but a charge may be filed by anyone. The Rules and Regulations of the Board, § 102.9, provides:

> "A charge that any person has engaged in or is engaging in any unfair labor practice affecting commerce may be made by any person."

Under this kind of statutory and regulatory language, no invidious inference should be drawn from the identity of the charging party.

The *Servette* case shows, if example were necessary, that retailers will withdraw an offending item from sale rather

than involve themselves in another's quarrel. If it requires the expenditure of time, counsel fees, attendance at hearings and so on, to say nothing of the unfavorable notices in union newspapers and periodicals, and possible embarrassment of its own labor relations by filing unfair labor practice charges against the labor organization involved in a dispute with one of its producers, only the staunchest crusader would undertake the venture rather than submit to the union's demands.

There is no warrant in the statutory language or the legislative history for assuming that Congress, in 8(b)(4)(B), sought to protect *only* secondary employers from economic harm. Congress did seek to protect this group, but it sought primarily to confine the scope of economic pressure and to keep the channels of interstate commerce open. Section 1 of the Act, fourth paragraph, provides:

> "Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed."

All of subsection 8(b) is designed to effectuate such intent. To argue that a primary employer is out of place protecting its retailers from unlawful picketing is as unrealistic as to argue that a particular employee has not suffered unlawful discrimination at the hands of his employer or his bargaining agent because he is not the charging party.

Congress has deliberately removed the onus of filing charges from the employers and employees it sought to

protect by providing that charges may be filed by *anyone*, not just by the party injured or the real party in interest.

The decision of the lower court goes a long way toward rendering futile this salutary provision. This aspect of the decision of the court below would, if allowed to stand, affect and hamper the enforcement of the whole Act.

## II.

## SECTION 8 (b) (4) AS CONSTRUED BY THE BOARD IS CONSTITUTIONAL

The court below began its discussion of the constitutional difficulties it thought were "by no means minimal" in the Board's interpretation, by quoting out of context and misapplying some remarks by Representative Griffin, p. 315, R. 62. The colloquies from which the court extracted its quotations are reprinted in full in Appendix C to this brief. That the excerpts quoted by the court are entirely inapposite is demonstrated by the exchange preceding the second excerpt:

> "Mr. Griffin—First of all I assume the gentleman is talking about primary picketing. We are not talking about a secondary boycott in this situation?
>
> "Mr. Gubser—That is right." II Legis. Hist. 1615.

The complete answer to the court's qualms about the constitutionality of 8(b)(4) as construed by the Board would seem to lie in the following language of this court in *Giboney v. Empire Storage Co.*, 336 U.S. 490, 69 S.Ct. 684, 93 L.Ed. 834:

> "It is contended that the injunction against picketing adjacent to Empire's place of business is an unconstitutional abridgment of free speech because the pickeeters were attempting peacefully to publicize truthful facts about a labor dispute. See *Thornhill v. Alabama*, 310 U.S. 88, 102, and *Allen Bradley Co. v. Union*, 325 U.S. 797, 807, note 12. But the record here does not per-

mit this publicizing to be treated in isolation. For according to the pleadings, the evidence, the findings, and the argument of the appellants, the sole immediate object of the publicizing adjacent to the premises of Empire, as well as the other activities of the appellants and their allies, was to compel Empire to agree to stop selling ice to non-union peddlers. Thus all of appellants' activities — their powerful transportation combination, their patrolling, their formation of a picket line warning union men not to cross at peril of their union membership, their publicizing — constituted a single and integrated course of conduct, which was in violation of Missouri's valid law. In this situation, the injunction did no more than enjoin an offense against Missouri law, a felony.

"It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute." pp. 497-498.

In *Building Service Employees' Union v. Gazzam*, 339 U.S. 532, 70 S.Ct. 784, 94 L.Ed. 1045, rehearing denied, 339 U.S. 991, 70 S.Ct. 1019, 94 L.Ed. 1391, the same principle was applied where the picketing enjoined was not for a felonious object, but for an object contrary to the public policy of the state. This court said:

"This Court has said that picketing is in part an exercise of the right of free speech guaranteed by the Federal Constitution. *Cafeteria Employees Union v. Angelos*, 320 U.S. 293; *Bakery & Pastry Drivers & Helpers Local v. Wohl*, 315 U.S. 769; *American Federation of Labor v. Swing*, 312 U.S. 321; *Carlson v. California*, 310 U.S. 106; *Thornhill v. Alabama*, 310 U.S. 88; *Senn v. Tile Layers Union*, 301 U.S. 468. But since picketing is more than speech and establishes a *locus in quo* that has far more potential for inducing action or nonaction than the message the pickets convey, this Court has not hesitated to uphold a state's restraint of acts

and conduct which are an abuse of the right to picket rather than a means of peaceful and truthful publicity. . . .

"Petitioners insist that the *Swing* case, *supra*, is controlling. We think not. In that case this Court struck down the State's restraint of picketing based solely on the absence of an employer-employee relationship. *An adequate basis for the instant decree is the unlawful objective of the picketing*, namely, coercion by the employer of the employees' selection of a bargaining representative. Peaceful picketing for any lawful purpose is not prohibited by the decree under review." pp. 536-537, 539. (Emphasis supplied)

Here the Board has found that the picketing had one of the four objectives proscribed by section 8(b)(4) of the Act (R. 46). It seems strange indeed to suggest, as the lower court, in effect, held, "that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct," which Congress has declared to be an unfair labor practice.

The United States Court of Appeals for the Fifth Circuit correctly rejected the argument that the Board's construction of the statute resulted in rendering the section invalid under the First Amendment in *Burr v. NLRB*, *supra*, 47 Labor Cases ¶ 18, 376, pp. 24, 484 - 24, 485.

The court below discussed picketing as a "signal" and seemed to think that the type of picketing here involved could not be prohibited by Congress because it did not purport to "signal" the employees of the secondary employer, citing Cox, Strikes, Picketing and the Constitution, 4 Vand. L. Rev. 574, 594.

Concerning the distinction between "signal" picketing and "publicity" picketing, Professor Cox himself said:

"This distinction between 'signal picketing' and

'publicity picketing' has been noted in discussions of the question whether picketing should be protected by the first and fourteenth amendments as a method of communication, but it attracted no significant judicial support." Footnote 41, Cox, the Landrum-Griffin Amendments to the National Labor Relations Act, 44 Minn. L. Rev. 257, 267.

In a case note in 62 Columbia Law Review 1336, reviewing the decision of the court below, the commentator said:

"In rejecting the construction of section 8(b)(4)(ii)(B) that would implement Congress' well-demonstrated intent to ban all secondary picketing, the court—reasoning that this interpretation was necessary to avoid deciding a 'serious' constitutional question — incorrectly synthesized past Supreme Court cases as not being applicable to all forms of picketing. The instant court placed great weight on a distinction between 'signal' and 'publicity' picketing urged some years ago by Professor Cox. Yet it is clear, as Cox himself has admitted, that the Court has never accepted, nor even considered, the tenability of such a distinction. Moreover, in at least one Supreme Court case upholding a ban on peaceful picketing, there was present neither an appeal to organized employees, *i.e.*, a 'signal,' nor effects sufficiently severe to justify a prohibition of 'pure speech.' While it may be possible to read the previous cases so narrowly as to set them, as a class, apart from the instant situation, this would fail to take into account the clear trend toward upholding all bans on peaceful picketing, short of the suppression of every effective means of relating to the public the facts of a labor dispute. Certainly section 8(b)(4)(ii)(B) of the amended act is not the omnibus prohibition against which the Supreme Court has inveighed, for throughout the act much room has been left for the communication of labor grievances. Its plainly articulated purpose, which has been expressly upheld by the Court as a legitimate ground for banning picketing, was to avert

secondary boycotts. In addition, the instant court's determination that the more plausible reading of the statutory language does not prohibit picketing *per se* is itself subject to attack. Reliance by the court on Congress' failure to ban picketing expressly in section 8(b)(4)(ii) when it had done so in the section of the act dealing with union recognition appears to be inapposite. In the latter section, distinctions were drawn between various forms of picketing, some of which were outlawed, where as in section 8(b)(4)(ii) all picketing was included within a single reference. The only issue raised by an examination of the actual words employed in section 8(b)(4)(ii) is whether 'picketing' is, without more, comprehended within the words 'threaten, coerce, or restrain.' Although uniformity does not prevail, both the common law and a widely held modern view is that labor picketing, by its very nature, does have coercive effects. In any event, the language of the section does not itself compel the narrow construction adopted by the instant court. The determinative factor, therefore, should have been the legislative intent that all secondary picketing be banned. The effect of the decision in the instant case is to make permissible a wide range of activity that Congress clearly sought to proscribe." pp. 1341-1342.

The lower court's citation of picket lines to voice objections to various policies of businesses, maintained by people other than labor unions, is wholly inapposite because section 8(b) does not relate to picketing generally or "do not patronize" appeals by such other groups. Section 8(b) provides that

> "it shall be an unfair labor practice for a labor organization or its agents . . ."

to engage in certain specified conduct. Consumer picketing is not forbidden to anyone else.

The power of the state and federal governments to limit

the scope of industrial conflict has always been recognized, Brandeis, dissenting, *Duplex Co. v. Deering*, 254 U.S. 443, 488, 41 S.Ct. 172, 65 L.Ed. 349; *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 69 S.Ct. 684, 93 L.Ed. 834.

Moreover, the lower court was confused as to what "signals" Congress was prohibiting. The court overlooked the difference between clauses (i) and (ii). Clause (i) makes it an unfair labor practice to induce or encourage *any individual employed* by any person, etc., for the four proscribed purposes. Clause (ii) makes it an unfair labor practice to threaten, coerce or restrain *any person* for the four proscribed purposes. Thus the "signal" need not even be directed at employees to run afoul of clause (ii). Flashing the *picket* signal *at any person* for any of the four proscribed objectives is prohibited. The effect or intended effect on *employees* of a particular employer is irrelevant to a charge under clause (ii).

## CONCLUSION

The decision of the Court of Appeals for the District of Columbia is erroneous both in its construction of the statute and in its appraisal of the constitutionality of the Board's construction.

If allowed to stand, it will not only frustrate the intent of Congress in legislating with reference to consumer boycotts, but will overturn the settled construction by the Board and the courts of all of section 8(b)(4).

The decision of the Court of Appeals for the Fifth Circuit in *Burr v. NLRB*, — F.2d —, 47 Labor Cases ¶ 18,376, on the identical questions is a correct analysis and should commend itself to this court.

The decision of the court below should be reversed.

Respectfully submitted,

ALFRED J. SCHWEPPE
MARY ELLEN KRUG
*Attorneys for Amicus Curiae.*

SCHWEPPE, REITER, DOOLITTLE & KRUG
657 Colman Building
Seattle, Washington 98104

## APPENDIX A

### PERTINENT PROVISIONS OF NATIONAL LABOR RELATIONS ACT

**61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 151, *et seq.***

**Section 2.** (2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shage holder or individual or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization. (Title 29, U.S.C. § 152(2)).

**Section 8.** (b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to

enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order of certification of the Board determining the bargaining representative for employees performing such work;

*Provided*, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recog-

nize under this subchapter: *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution. (Title 29, U.S.C. §158(b) (4))

• • •

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this subchapter any other labor organization and a question concerning representation may not appropriately be raised under section 159(c) of this title.

(B) where within the preceding twelve months a valid election under section 159(c) of this title has been conducted, or (C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from

the commencement of such picketing: *Provided,* That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159(c) (1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided, further,* That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this subsection (Title 29, U.S.C. § 158(b) (7)).

**Section 10.** (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such a person an order requiring such person to cease

and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: * * *

(1) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 158 (b) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. * * * (Title 29, U.S.C. § 160(b), (c) and (1)).

## APPENDIX B

### FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

## APPENDIX C

### (II Legis. Hist. 1615 (1-3))

Mr. Brown of Ohio —

Mr. Chairman, I should like to propound a question either to Mr. Griffin or to Mr. Landrum, the authors of one of the bills, relative to secondary boycotts. If I understood their testimony before the Committee on Rules correctly, the authors of this bill stated their bill will deal properly with secondary boycotts.

My question concerns the picketing of customer entrances to retail stores selling goods manufactured by a concern under strike. Would that situation be prohibited under the gentleman's bill?

Mr. Griffin —

Let us take for example the case that the President talked about in his recent radio address. A few newspapers reported that the secondary boycott described by the President would be prohibited under the present act. It will be recalled that the case involved a dispute with a company that manufactured furniture. Let us understand that we are not considering, as I understand your question, the right to picket at the manufacturing plant where the dispute exists.

Mr. Brown of Ohio —

That is right. We are looking only at the problem of picketing at a retail store where the furniture is sold.

Mr. Griffin —

Then, we are not talking about picketing at the place of the primary dispute. We are concerned about picketing at a store where the furniture is sold. Under the present law, if the picketing happens to be at the employee entrance so

that clearly the purpose of the picketing is to induce the employees of the secondary employer not to handle the products of the primary employer, the boycott could be enjoined.

However, if the picketing happened to be around at the customer entrance, and if the purpose of the picketing were to coerce the employer not to handle those goods, then under the present law because of technical interpretations, the boycott would not be covered.

Mr. Brown of Ohio —

In other words, the Taft-Hartley Act does not cover such a situation now?

Mr. Griffin—The way it has been interpreted.

Mr. Brown—But the Griffin-Landrum bill would?

Mr. Griffin—Our bill would; that is right. If the purpose of the picketing is to coerce or to restrain the employer of that second establishment to get him not to do business with the manufacturer—then such a boycott could be stopped.

Mr. Brown of Ohio—Not to sell the goods of some concern that is on strike. Would that same rule apply to the picketing at the customer entrances, for instance, of plumbing shops, or newspapers that might run the advertising of these concerns, or radio stations that might carry their program?

Mr. Griffin—Of course, this bill and any other bill is limited by the constitutional right of free speech. If the purpose of the picketing is to coerce the retailer not to do business with the manufacture, whether it is plumbing—

Mr. Brown of Ohio—Advertising.

Mr. Griffin—Advertising, or anything else, it would be covered by our bill. It is not covered now. * * *

Mr. Gubser—Mr. Chairman, I should like to ask the co-author of the Landrum-Griffin bill a question which follows along the lines of the questioning of the gentleman from Ohio (Mr. Brown). Specifically, under the Griffin-Landrum Bill, let us say there is a picket in front of a business establishment, and he carries a sign, "This establishment is not affiliated with the AFL." Could that be accomplished legally under the Griffin-Landrum bill?

Mr. Griffin—*First of all I assume the gentleman is talking about primary picketing. We are not talking about a secondary boycott in this situation?*

Mr. Gubser—That is right.

Mr. Griffin—We must look to the purpose of the picketing in the particular situation. Under H.R. 8400, looking at page 66, it provides that where an object of the picketing is to force or require employees to accept or select such labor organization as their bargaining agent, then the picketing in that case would be illegal unless the union can show that at least 3 out of 10 of the employees are interested in the union. This is subject, however, to the constitutional right of free speech. *Unless the picketing is for the coercive purpose intdicated it would not be affected by this language.* In other words, whether it is the handing out handbills or putting an ad in the paper or picketing, if it is done in such a way so as clearly to be nothing more than an exercise of free speech, then the provision would not be violated. (Emphasis supplied)